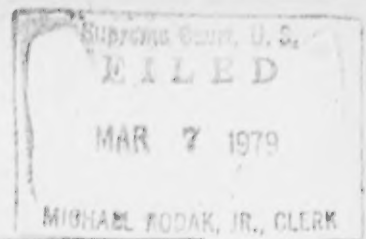


No. 78-966



In the Supreme Court of the United States

OCTOBER TERM, 1978

JACKIE DAVID MILLER, PETITIONER

v.

UNITED STATES OF AMERICA,

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 29a-68a) is not yet reported. The memorandum opinion of the district court (Pet. App. 1a-28a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1978. The petition for a writ of certiorari was filed on December 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial judge, in setting an appropriate sentence, may consider the defendant's failure to cooperate with the government and to admit guilt after his conviction.

STATEMENT

Following a jury trial in the United States District Court for the District of Maine, petitioner was convicted on one count of importing marijuana, in violation of 21 U.S.C. 952(a), one count of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and one count of possessing hashish, in violation of 21 U.S.C. 844(a). He was sentenced to concurrent terms of five years' imprisonment on each of the first two counts and one year's imprisonment on the third count. He was also sentenced to concurrent two-year special parole terms on the first two counts. The court of appeals affirmed (Pet. App. 29a-68a).

1. The facts are summarized in the opinion of the court of appeals (Pet. App. 30a-37a) and the memorandum opinion of the district court (Pet. App. 2a-13a). In May 1977, employees of a marina in Arrowsic, Maine notified the Coast Guard that a yacht was fouled in a mooring about 250 yards offshore (Pet. App. 30a, 2a; A. 188).¹ The Coast Guard in turn notified local police. Fearing a drowning, authorities boarded the boat. They found a registration and bill of sale that indicated that petitioner was the yacht's owner. They also found several thousand dollars' worth of new electronic navigational equipment installed in an unprofessional manner, a number of partially burned marijuana cigarettes, and a navigational chart with a pencil-marked course leading to a secluded peninsula (Pet. App. 32a, 5a; A. 189-194, 515, 529).

Petitioner arrived at the marina while local police were on the yacht. He spoke to a marina employee about the possibility of renting a mooring and he inquired about the presence of law enforcement officers on his boat. He then

¹"A." refers to the appendix in the court of appeals.

departed without stopping at the marina office or his yacht. He was apprehended after a high-speed chase (Pet. App. 32a-33a, 6a; A. 194-200, 511-514). The floor of petitioner's car contained marijuana debris, and two grams of hashish were found in a suitcase in the trunk (Pet. App. 33a-34a, 7a-9a; A. 135-136, 203-204, 529-530). In petitioner's pocket, police found a receipt for an industrial vacuum cleaner (Pet. App. 34a, 9a; A. 583; Gov. Exh. 3).

Thereafter, federal and state officers drove to the peninsula marked on the navigational chart. As they arrived, they saw a telescope protruding from a trash barrel on the dock (Pet. App. 35a, 10a; A. 292, 575). Substantial amounts of marijuana debris were spread over the boards of the dock and in the cracks between the boards (*ibid.*). Alongside a nearby road leading to the main house on the peninsula, police and an agent of the Drug Enforcement Administration found a tarpaulin covering a bulky object. Marijuana debris was scattered around the area (Pet. App. 35a, 11a; A. 300-301). The bulky object under the tarpaulin was a 40-pound bale of marijuana (Pet. App. 35a, 11a; A-301, 576). After obtaining a warrant to search the buildings on the peninsula, the officers returned and found 60 bales of marijuana and a new industrial vacuum cleaner matching the one purchased the day before by petitioner (Pet. App. 36a, 12a; A.577, 583). Subsequent investigation revealed that petitioner had leased the peninsula property on behalf of a fictitious organization (Pet. App. 36a; A.452-454, 460-464; Gov. Exh. 6, 7).

2. At petitioner's sentencing hearing, the district court articulated its reasons for imposing the sentence it did (Pet. App. 64a-65a n.18; A. 868-872).² The court first

²Although the district court sentenced petitioner to the maximum possible term of imprisonment on each count, the court provided that the sentences are to run concurrently. Petitioner's total sentence is thus less than half the statutory maximum.

remarked that it was convinced of petitioner's guilt on all three counts and that petitioner appeared to be only a part of "a very substantial criminal operation" to import marijuana and possibly other illicit drugs into the United States. The court then commented that petitioner continued to deny guilt and that admission of error is the first step in rehabilitation. The court noted that petitioner had declined to cooperate in any way in apprehending others involved in the criminal enterprise. The court acknowledged petitioner's Fifth Amendment right not to incriminate himself, but concluded that the sentence imposed was appropriate in light of petitioner's prior criminal record.

ARGUMENT

Petitioner contends that the district court's reference to his failure to confess or cooperate with the government indicated that a penalty was imposed because he exercised his Fifth Amendment right not to incriminate himself. The court of appeals correctly rejected this contention in an opinion on which we rely (Pet. App. 64a-68a).

As the court of appeals indicated after its review of the district court's sentencing statement, the district court in this case did not impose an additional penalty on the basis of petitioner's failure to confess or cooperate; rather, the court simply considered petitioner's behavior as one relevant factor in evaluating his prospects for rehabilitation. Though the difference may be subtle, the court of appeals properly identified a distinction between "punishing a defendant for maintaining his innocence and preserving his right to appeal," on the one hand, and "merely considering a defendant's failure to recant when evaluating his prospects for rehabilitation without incarceration," on the other. A fair reading of the district court's sentencing statement reveals that the trial judge considered petitioner's failure to confess or cooperate only

for what it showed about petitioner's character and attitude toward society, not as a basis for punishment.

District courts have broad latitude in imposing sentence within statutory limits. *Dorszynski v. United States*, 418 U.S. 424 (1974). In making "the punishment * * * fit the offender and not merely the crime," *Williams v. New York*, 337 U.S. 241, 247 (1949), the sentencing judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446 (1972); see 18 U.S.C. 3577. Both the evidence heard at trial and the demeanor of the accused can be considered. *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973). In *United States v. Grayson*, No. 76-1572 (June 26, 1978), slip op. 10, this Court observed that "[a] defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing."

Quoting *Williams v. New York*, *supra*, 337 U.S. at 248, *Grayson* emphasized (slip op. 4) that "sentences should be determined with an eye toward the '[r]eformation and rehabilitation of offenders.'" Many courts have recognized that a first step in the rehabilitation process is the recognition that one is at fault. See, e.g., *United States v. Floyd*, 496 F. 2d 982, 989 (2d Cir.), cert. denied, 419 U.S. 1069 (1974); *Gollaher v. United States*, 419 F. 2d 520, 530 (9th Cir.), cert. denied, 396 U.S. 960 (1969). Accordingly, the courts of appeals have indicated that "a court may properly invoke its power to grant lenity to those who, having admitted transgressions against the sovereign, thereafter assist the sovereign in improving social order and the public welfare." *United States v. Garcia*, 544 F. 2d 681, 682 (3d Cir. 1976); *United States v. Thompson*, 476 F. 2d 1196, 1201 (7th Cir.), 414 U.S. 918 (1973).

Objections frequently arise, however, when a trial judge imposes sentence after noting that a defendant has failed

to admit guilt or cooperate with the authorities. A number of appellate decisions have sustained sentences imposed under such circumstances. See *United States v. Santiago*, 582 F. 2d 1128 (7th Cir. 1978); *United States v. Richardson*, 582 F. 2d 968 (5th Cir. 1978); *United States v. Floyd*, *supra*; *United States v. Thompson*, *supra*; *United States v. Vermeulen*, 436 F. 2d 72 (2d Cir. 1970), cert. denied, 402 U.S. 911 (1971); *United States v. Chaidez-Castro*, 430 F. 2d 766 (7th Cir. 1970); *Gollaher v. United States*, *supra*.³

Petitioner argues, however, that the courts of appeals are in conflict on the question presented here. In support of this assertion, he cites *United States v. Garcia*, *supra*; *Thomas v. United States*, 368 F. 2d 941 (5th Cir. 1966); and *Scott v. United States*, 419 F. 2d 264 (D.C. Cir. 1969). Those cases all involved a trial judge's explicit attempts to bargain with a defendant by proffering a lighter sentence in exchange for an admission of guilt or

³Petitioner attempts (Pet. 9 n.3) to distinguish some of these cases on the ground that the sentences imposed "were substantially less than the maximum," whereas the district court sentenced petitioner to the maximum possible term of imprisonment on each count. As indicated above (see note 2, *supra*), however, the sentences imposed upon petitioner totalled five years' imprisonment, whereas the maximum possible sentence would have been 11 years' imprisonment (*i.e.*, consecutive maximum terms on each count).

More fundamentally, of course, if petitioner is correct that a sentencing court's consideration of a defendant's failure to confess violates the Fifth Amendment, that violation could not be cured simply by the imposition of a sentence below the statutory maximum. In short, petitioner's proposed distinction of the cases cited in the text is wholly unconvincing.

cooperation with authorities.⁴ No such bargaining occurred here, and the district court considered petitioner's failure to confess and cooperate only as a factor relevant to the possibility of ameliorating the sentence on the basis of petitioner's potential for rehabilitation.⁵

Nonetheless, the cases cited by petitioner and other decisions from the same courts of appeals (see *United States v. Rogers*, 504 F. 2d 1079 (5th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); *United States v. Hopkins*, 464 F. 2d 816 (D.C. Cir. 1972)), do suggest that, even in the absence of open bargaining, a judge evaluating a defendant's prospects for rehabilitation may not consider as one factor the defendant's refusal to admit guilt or to cooperate with the authorities against his confederates. Whatever the extent of the divergence among the circuits, however, we submit that this Court should not presently undertake to resolve the conflict. The court of appeals properly upheld the district court's sentencing decision, and other courts of appeals that might once have disapproved the result may wish to reassess their positions

⁴Other cases disapproving sentencing colloquies that involved bargaining include *United States v. Wright*, 533 F. 2d 214 (5th Cir. 1976); *United States v. Laca*, 499 F. 2d 922 (5th Cir. 1974); and *United States v. Rodriguez*, 498 F. 2d 302 (5th Cir. 1974). Some cases have upheld sentences despite a judge's bargaining efforts to extract a confession or cooperation with the government. *E.g.*, *United States v. Vermeulen*, *supra*; *United States v. Chaidez-Castro*, *supra*.

⁵Petitioner contends (Pet. 10) that whether explicit bargaining occurs is immaterial. But it is one thing for a judge to display leniency when he determines a defendant is likely to be rehabilitated, and another to urge a defendant to confess or cooperate in the hope of a lighter sentence. As the court of appeals acknowledged (Pet. App. 66a), although the question of the validity of this latter conduct is not posed here, "open bargaining with the defendant may indicate that the trial court is punishing the defendant for failing to confess his misdeeds * * *."

in light of *United States v. Grayson, supra*. The three courts of appeals to address the question since *Grayson* have sustained the sentences imposed. See, in addition to the present case, *United States v. Santiago, supra*, and *United States v. Richardson, supra*. Although the panel decision in *Richardson* addressed the point only briefly, it may indicate that the Fifth Circuit is prepared to abandon the views expressed in *United States v. Rogers, supra*, and *Thomas v. United States, supra*, in light of this Court's decision in *Grayson*.

The responsibility of the sentencing judge "to consider the defendant's whole person and personality," *United States v. Grayson, supra*, slip op. 12, permits review of all factors relevant to the defendant's potential for rehabilitation. The willingness to admit guilt and to cooperate with authorities is one such factor. Because the decision below is correct and because any disagreement among the circuits may soon be eliminated in the aftermath of *Grayson*, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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